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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 568

BERT TAUNAH AND PEAWIFEAH TAUNAH,
PETITIONERS

v.

H. C. JONES, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 46-53) are reported at 90 F. Supp. 459. The majority and the dissenting opinions of the Court of Appeals (R. 59-64, 65-68) are reported at 186 F. 2d 445, 448.

JURISDICTION

The judgment of the Court of Appeals was entered January 2, 1951. (R. 68.) The petition for

a writ of certiorari was filed on February 20, 1951. The jurisdiction of this Court is involved under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether taxpayers, who are full-blood restricted Comanche Indians, are subject to federal income taxes on their income directly derived from their allotted lands.

STATUTES AND EXECUTIVE ORDER INVOLVED

The relevant statutes and Executive Order will be found in the Appendix, *infra,* pp. 13-20.

STATEMENT

The facts found by the District Court are substantially as follows (R. 46-48):

Peawifeah (Flora Taunah), a taxpayer herein, is a full-blood restricted Comanche Indian (with Allotment No. 1929, Individual Indian Account No. P-116). She owns certain restricted Indian land some of which was originally allotted to her and some of which she inherited. Title to this land is held in trust by the United States Government for Peawifeah. (R. 46.)

Bert Taunah (Wauk-We), the other taxpayer herein and husband of Peawifeah, is a full-blood restricted Comanche Indian (with Allotment No. 742, Individual Indian Account No. B-47). He owns certain restricted Indian land some of which was originally allotted to him and some of which he inherited. Title to this land is held in trust

by the United States Government for Bert Taunah. (R. 46-47.)

The original trust patents for the land in question were issued to the allottees by the General Land Office under date of August 25, 1901. The trust period of twenty-five years has been extended by Executive Order, as provided by law, and the extended trust period has not expired. The land was allotted to, or inherited by, the taxpayers under the provisions of the General Allotment Act of 1887 (*infra*, pp. 14-16), and the Jerome Agreement of 1892, ratified by Congress, June 6, 1900 (*infra*, pp. 16-19). (R. 47.)

During the year 1946, Peawifeah received $195.56 agricultural and interest income, and $25,239.99 oil and gas rentals and royalties, all except $22.46 of which came from her original allotment. A deduction for depletion of 27½ per cent, or $6,941, was taken on the royalty income, resulting in a determination of Peawifeah's taxable income for 1946 as $18,494.55. (R. 47.)

During the year 1946, Bert Taunah received $345 agricultural lease income, $360 oil and gas royalty income, $100 oil lease bonus, and 40¢ interest (not in controversy), making a total income of $805.40. A deduction of $99 for percentage depletion on the bonus and royalty income resulted in a determination that Bert Taunah's taxable income was $706.40. (R. 47.)

Thus, the aggregate taxable income received, in

1946, by Peawifeah and Bert Taunah from all sources was $19,200.95. This amount was equally divided between them for income tax purposes; the resulting income tax collected totaled $3,950.42. (R. 47.)

The income tax return for the calendar year 1946 was prepared and filed for taxpayers by a United States Government employee of the Southern Plains Agency, formerly the Western Oklahoma Consolidated Agency and the Kiowa Indian Agency, at Anadarko, Oklahoma. The tax payable under the return was deducted, on January 31, 1947, from taxpayers' individual Indian accounts on deposit with the Treasurer of the United States and under the supervision and control of the Secretary of the Interior, and was credited to the account of United States Collector of Internal Revenue for the District of Oklahoma. (R. 48.)

None of the income involved was paid directly to these taxpayers, but all was paid into the Indian Agency at Anadarko, Oklahoma, and each disbursement therefrom was made under supervision and control of the Department of the Interior. All such restricted funds are held by the United States Government for the sole use and benefit of the individual Indian owner, and all receipts or expenditures for each Indian are credited or charged to his individual account. (R. 48.)

All income involved in this controversy is derived directly from the land which was allotted or

inherited under the provisions of the General Allotment Act of 1887 and the Jerome Agreement. (R. 48.)

The District Court concluded (R. 48-53) that the General Allotment Act and the Jerome Agreement relieved the Indian wards' lands from the burdens of all taxation and that the tax exemption so created covered income derived from the lands. It thus gave judgment for recovery of the 1946 tax paid by these taxpayers. The Court of Appeals, Chief Judge Phillips dissenting, reversed (R. 59-68.)

DISCUSSION

I

In our view, the judgment of the Court of Appeals is clearly correct.

1. It is now settled that Sections 11, 21, and 22 of the Internal Revenue Code (Appendix, *infra,* pp. 13-14) subject to income tax all the income of Indian citizens of the United States, like that of other citizens, unless an exemption from such taxation is definitely expressed in an agreement with the Indians or some Act of Congress dealing with their affairs. *Superintendent* v. *Commissioner,* 295 U.S. 418; *Choteau* v. *Burnet,* 283 U. S. 691; *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U.S. 342, 353, fn. 21; cf. *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598, 606-608. Neither the General Allotment Act of 1887 nor the Jerome Agreement (Appendix, *infra,* pp. 14-19), which are the only

provisions relied on by taxpayers as applicable to the Comanche, contains any specific exemption from taxation. Taxpayers would, however, read an exemption from federal income taxation into the undertaking of the United States to convey the allotted land to the Indian at the end of the trust period discharged of trust and "free of all charge or incumbrance whatsoever". While this provision has been held to prevent the imposition of an *ad valorem* tax on the allotted land by a state because, *inter alia,* such a tax, if unpaid, could be a charge on the land at the end of the trust period (*United States* v. *Rickert,* 188 U.S. 432, 438), the provision does not preclude the imposition of a federal tax on *income* derived from the land. Such a tax could, in no circumstances, be a lien or encumbrance on the land as of the end of the trust period, both because the tax is collectible currently by the United States out of the very income taxed which is held by it in trust for the Indian, and also because, even if the United States failed through oversight to pay itself the tax due on the income in its hands, the United States could, and would, not enforce a lien for the unpaid tax against the land at or after the end of the trust period in the face of its promise to convey the land free of encumbrance at the end of the trust period.[1]

[1] While Indians believed to have sufficient business capacity, knowledge, and experience may be permitted to negotiate leases of restricted land for farming and grazing purposes and to collect the rentals thereon, with the approval of the Superintendent, (25 Code of Federal Regulations (1938 ed.,) Sec-

2. There is also no validity to the taxpayers' contention (Pet. 11) that taxation of the oil and gas royalty income diminishes the value of the land and thus necessarily constitutes a violation of the undertaking of the United States to convey the land at the end of the trust period free of all charges and encumbrances. The production of oil and gas represents partly an income-producing operation and partly the wasting of a capital asset, the oil and gas in place. Like the mining of ores, such production results in a profit, for the oil and gas are worth more extracted and severed than they were worth in the ground. *Stratton's Independence* v. *Howbert,* 231 U.S. 399, 415, 416; *Murphy Oil Co.* v. *Burnet,* 287 U.S. 299; *Burnet* v. *Harmel,* 287 U.S. 103; *Anderson* v. *Helvering,* 310 U.S. 404, 407-408; *Kirby Petroleum Co.* v. *Commissioner,* 326 U.S. 599, 602-603. In determining the profit or income from production for income tax purposes, Congress has, from the beginning of the tax under the Sixteenth Amendment, always provided for a depletion deduction,[2] which is regarded

tions 171.2 and 171.4), the United States would, as stated above, be unable to assert a lien for taxes due on such rentals at the end of the trust period.

An Indian allottee actually declared competent may, in the discretion of the Secretary of the Interior, receive a patent to his allotted lands in fee simple, free of all restrictions. (Act of May 8, 1906, Appendix, *infra,* pp. 19-20.

[2] Sec. II of the Income Tax Act of 1913, c. 16, 38 Stat. 114, 166-181; Secs. 5(a) Eighth and 12(b) Second of the Revenue Act of 1916, c. 463, 39 Stat. 756; Secs. 214 (a)(10) and 234(a)(9) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, and of the Revenue Act of 1921, c. 136, 42 Stat. 227; Secs. 214 (a)(9) and 234(a)(8) of the Revenue Act of 1924, c. 234,

as compensation for the reduction in the mineral content of the land from which the mined product is taken. *Anderson* v. *Helvering, supra,* p. 408; *United States* v. *Ludey,* 274 U.S. 295, 302. Taxpayers in this case were allowed, under Section 23(m), Internal Revenue Code, the 27½% depletion deduction provided by Section 114(b)(3) of the Code with respect to the royalties and bonuses received by them for the taxable year 1946. (R. 47.) Consequently, such part of the royalties and bonuses as represents the proceeds from the conversion of the oil and gas in place, *i.e.,* a part of the land, is actually exempted from income tax. Thus, to the extent that the land has diminished in value through being depleted of the oil and gas in place, the taxpayers, or the Indian Agency for their accounts, have received, and will receive, cash proceeds not reduced by the income tax. In effect, taxpayers receive a part of their lands in cash prior to the expiration of the trust period. This partial performance by the United States of its promise, prior to the date fixed for performance, can hardly be deemed a violation of the promise.

Although the Treasury has several times recommended to Congress that the percentage depletion deduction be eliminated, it has not recommended elimination of a deduction for the actual depletion

43 Stat. 253, and of the Revenue Act of 1926, c. 27, 44 Stat. 9; Secs. 23(l) and (m) and 114(b) of the Revenue Act of 1928, c. 852, 45 Stat. 791, and of the Revenue Act of 1932, c. 209, 47 Stat. 169; Secs. 23(m) and (n) and 114(b) of the Revenue Act of 1934, c. 277, 48 Stat. 680, of the Revenue Act of 1936, c. 690, 49 Stat. 1648, of the Revenue Act of 1938, c. 289, 52 Stat. 447, and of the Internal Revenue Code.

sustained. Congress, of course, has not even adopted the Treasury's recommendation with respect to percentage depletion, and there is certainly no basis for a view that Congress will withdraw completely the right to any depletion deduction whatever. Because oil and gas are fugacious minerals, the amount and value of the oil and gas in place on taxpayers' lands—represented by that extracted and to be extracted in the future under the leases—could never be precisely known. But it cannot be said that the percentage depletion deduction (which is allowable so long as oil or gas is produced and sold irrespective of whether or not the value of the oil and gas in place, or the cost, if any, of the property, has already previously been returned), or depletion allowed on some other basis which Congress might adopt, will not compensate in full for any reduction in value of the land caused by withdrawal of the oil and gas in place, the value of which, as distinguished from their value when brought to the surface and severed for sale, is relatively small.

In any event, as stated above, it cannot be claimed that the 1946 tax, by itself, will diminish the value of the land since taxpayers were actually allowed deductions for depletion on the percentage basis.

3. There is likewise no merit to taxpayers' further assertion (Pet. 12), that the judgment below unwarrantedly imputes to Congress an inconsistent policy with respect to taxation of agricultural

income from restricted allotted lands received by Indians of different tribes. In the first place, taxpayers' assumption that, because part of the restricted allotted lands of the Five Civilized Tribes and the Quapaws are exempted by statute and treaty from all taxation, the agricultural income from such lands is also necessarily exempt from such taxation is not justified. A tax on income derived from land does not amount to a tax on the land itself. *N. Y. ex rel. Cohn* v. *Graves,* 300 U.S. 308, 314-315; *Superintendent* v. *Commissioner,* 295 U.S. 418. Cf. *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598, 604-610, and *Landman* v. *Commissioner,* 123 F. 2d 787, 790 (C.A. 10), certiorari denied, 315 U.S. 810. Thus, taxation of the income from allotted lands of a restricted Indian is permitted, even though his lands may be tax exempt. *Superintendent* v. *Commissioner, supra,* wherein *Blackbird* v. *Commissioner,* 38 F. 2d 976 (C.A. 10), embodying a contrary holding, was disapproved. Secondly, the General Allotment Act and the Jerome Agreement have substantially different provisions from those applicable to the Five Civilized Tribes, construed by this Court in *Oklahoma Tax Comm'n* v. *United States, supra.* The provisions involved here—which do not refer at all to exemption from taxation—fully warrant the decision below, even assuming *arguendo* that members of the Five Civilized Tribes might be entitled to a different judgment.

Finally, it should be noted that the judgment in this case, insofar as taxation of the oil royalties and

bonuses is upheld, is entirely consistent with specific provisions authorizing federal (and state) taxation of such income from restricted tax-exempt lands belonging to members of the Five Civilized Tribes. Section 3, Act of May 10, 1928, c. 517, 45 Stat. 495, 496; Act of January 27, 1933, c. 23, 47 Stat. 777. See *Oklahoma Tax Comm'n* v. *United States,* 319 U. S. 598, 604, fn. 6. It follows, on petitioners' own theory, that Congress did not adopt an "inconsistent policy as to tax exemption of restricted allotted Indian lands" (Pet. 12), and that petitioners' oil and gas income, forming the bulk of their gain (*supra*, pp. 3-4), is clearly taxable.

II

As shown in Part I, the holding of the Court of Appeals is correct. No conflict exists and none is asserted by the taxpayers. However, this action is a test case, instituted with the consent of the United States Commissioner of Indian Affairs, and the proper rule to be followed is of importance to those Indians having income from restricted allotted lands, as well as to the Bureau of Indian Affairs. Only in recent years has the Commissioner of Internal Revenue been collecting an income tax on the direct income of restricted Indians from their allotted lands.

We are informed by the Department of the Interior that about three-quarters of all allotted Indian lands were granted under the General Allotment Act, here involved, and that about two-thirds of the restricted Indians holding allotted

lands hold under that Act. These number between 225,000 and 240,000 persons, and the lands lie in various states west of the Mississippi River, both within and without the jurisdiction of the Court of Appeals for the Tenth Circuit. The administrative officials of the Bureau of Indian Affairs do not feel justified, on the basis of the decision below alone, in paying income taxes on behalf of any of these Indians, except the 1800 members of the Comanche, Kiowa, and Apache tribes, which are the tribes covered by the Jerome Agreement. A ruling by this Court will, of course, have more universal effect, and will preclude the necessity for further litigation. Accordingly, the Department of the Interior is anxious for a determination by this Court.

In these circumstances, the Court may consider that a sufficient basis exists for review at this time. However, if the petition is granted, the Court may also feel warranted in affirming the judgment below without further brief or argument.

Respectfully submitted,

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MARCH, 1951.

APPENDIX

1. Internal Revenue Code:

SEC. 11 [as amended by Section 101(a), Revenue Act of 1945, c. 453, 59 Stat. 556]. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax determined by computing a tentative normal tax of 3 per centum of the amount of the net income in excess of the credits against net income provided in section 25, and by reducing such tentative normal tax by 5 per centum thereof. For alternative tax which may be elected if adjusted gross income is less than $5,000, see Supplement T.

(26 U.S.C. 1946 ed., Sec. 11.)

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * *

(26 U.S.C. 1946 ed., Sec. 21.)

SEC. 22 [as amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574]. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or

instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

(26 U.S.C. 1946 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(26 U.S.C. 1946 ed., Sec. 23.)

2. General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388:

That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof,

to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: * * *

(25 U.S.C. 1946 ed., Sec. 331.)

Sec. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

(25 U.S.C. 1946 ed., Sec. 348.)

Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the

respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

(25 U.S.C. 1946 ed., Sec. 349.)

3. Jerome Agreement, ratified by the Act of June 6, 1900, c. 813, 31 Stat. 672:

Sec. 6. Whereas David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed Commissioners on the part of the United States, did, on the sixth day of October, eighteen hundred and ninety-two, conclude

an agreement with the Comanche, Kiowa, and Apache tribes of Indians in Oklahoma, formerly a part of the Indian Territory, which said agreement is in the words and figures as follows:

"Articles of agreement made and entered into at Fort Sill, in the Indian Territory, on the twenty-first day of October, eighteen hundred and ninety-two, by and between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, Commissioners on the part of the United States, and the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory.

"ARTICLE I

"Subject to the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and subject to the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and subject to the conditions hereinafter imposed, and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following-described tract of country in the Indian Territory to wit: * * *

"ARTICLE II

"Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article I hereof, and in part consideration for the cession thereof, it is agreed by the United States that each member of said Comanche, Kiowa, and Apache tribes of Indians over the age of eighteen (18) years shall have the right to select for himself or herself one hundred and sixty (160) acres of land to be held and owned in severalty, to conform to the legal surveys in boundary; and that the father, or, if he be dead, the mother, if members of either of said tribe of Indians, shall have the right to select a like amount of land for each of his or her children under the age of eighteen (18) years; and that the Commissioner of Indian Affairs, or some one by him appointed for the purpose, shall select a like amount of land for each orphan child belonging to either of said tribes under the age of eighteen (18) years.

"ARTICLE V

"When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five (25) years, in the time and manner and to the extent provided for in the act of Congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and Territories over the Indians, and for other

purposes,' approved February 8, 1887, and an act amendatory thereof, approved February 28, 1891.

"And at the expiration of the said period of twenty-five (25) years the titles thereto shall be conveyed in fee simple to the allottees or their heirs, free from all incumbrances.

"ARTICLE XI

"This agreement shall be effective only when ratified by the Congress of the United States."

Said agreement be, and the same hereby is, accepted, ratified, and confirmed as herein amended.

That the Secretary of the Interior is hereby authorized and directed to cause the allotments of said lands, provided for in said treaty among said Indians, to be made by any Indian inspector or special agent. * * *.

4. Act of May 8, 1906, c. 2348, 34 Stat. 182:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"Sec. 6. * * * That the Secretary of the Interior may, in his discretion, and he is

hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, encumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; * * *."

* * * * *

(25 U.S.C. 1946 ed., Sec. 349.)

5. Executive Order 7464, September 30, 1936, 1 Fed. Register, Part II, p. 1507:

By virtue of and pursuant to the authority vested in me by section 5 of the Act of February 8, 1887, * * * it is ordered that the periods of trust applying to any Indian lands, whether of a tribal or individual status, which, unless extended, will expire December 31, 1936, or during the calendar year 1937, be, and they are hereby, extended in each case for a further period of twenty-five years * * *.

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